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states on statutes similar to ours, that a power to a married woman to take and enjoy property to her separate use does not involve the *jus disponendi*, the right to sell, pledge, or encumber it: *Miller v. Wetherby*, 12 Iowa 415; *Naylor v. Field*, 5 Dutcher 287; *Walker v. Reamy*, 36 Penna. St. 410.

The case of *Billings v. Baker*, 28 Barb. 343, is no authority against the position assumed here, because the New York statute, under which it arose, authorized the wife not only to take and hold to her separate use, but to "convey and devise," real and personal property.

There having been, therefore, no transfer to Mrs. Dean by the conveyance in question, a decree will be entered accordingly.

Circuit Court of the United States. District of Kentucky.

THE UNITED STATES v. JOHN RHODES ET AL.¹

Under the 13th Amendment to the Constitution of the United States, abolishing slavery and giving to "Congress power to enforce this Article by *appropriate legislation*," Congress is authorized to pass the Act of April 6th 1866, known as the CIVIL RIGHTS LAW, and said law is constitutional.

Under this act all persons stand upon a plane of equality before the law, as respects the civil rights therein mentioned and intended to be protected, without distinction as to race or color or any previous condition of slavery.

If a state law denies any of these rights, *e. g.*, the right of colored persons to testify, this act gives to the courts of the United States jurisdiction of all causes, civil and criminal, which affect or concern such persons.

Where a white person commits the crime of burglary, by breaking and entering the house of a colored person, in a state whose laws deny to such colored person the right to testify against the accused, the latter may be indicted, prosecuted, and convicted for such offence in the Courts of the United States.

THIS was an indictment for burglary, prosecuted in this court under the Act of Congress of the 6th of April 1866, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means for their vindication." The indictment charged that the defendants, being white persons, did on the night of May 1st 1866, in the county of Nelson, burglariously break and enter the house of Nancy Talbot, a citizen of the United

¹ We give a large amount of space to the following case, on account of the general interest it has excited, as shown by letters of inquiry particularly from our subscribers in the Southern States.—ED. AM. LAW REG.

States, of African descent, who was then and is now denied the right to testify against the defendants in the courts of Kentucky

The defendants having been found guilty by a jury, a motion was made in arrest of judgment.

Three grounds were relied upon in support of the motion :—

1. That the indictment was fatally defective.
2. That the case which it makes, or was intended to make, is not within the Act of Congress upon which it is founded.¹
3. That the act itself is unconstitutional and void.

1. The objection to the indictment was, that it averred that the right to testify was denied to the prosecutor by the law of Kentucky, but did not aver that white persons possessed such right. The court, however, was of opinion that the count was good, because the right of white persons to testify under similar circumstances was given by a public statute of Kentucky, of which the court was bound to take notice, and being a conclusion of law from the facts stated, needed not to be averred in the indictment ; citing 1 Chit. Crim. Law 188 ; 2 Bos. & Pull. 127 ; 2 Leach 942 ; 1 Bishop's Crim. Proc. §§ 52, 53.

2. The 1st section of the act provides that all citizens of the United States shall have the same rights in every state . . . to sue, be parties, and *give evidence*. The 3d section gives jurisdiction to this court “ of all causes, criminal and civil, *affecting* persons who are denied, or cannot enforce in the courts of the state where they may be, any of the rights secured to them by the 1st section.” It was argued that in a criminal prosecution the only persons *affected* are the government and the accused, and therefore this was not a case affecting Nancy Talbot within the act : *U. S. v. Ortega*, 11 Wheat. 467. The court was of opinion, however, that the phrase “ causes civil and criminal ” must be understood to mean *causes of civil action* and *causes of criminal prosecution*, which do affect the plaintiff in the one case, and the party against whose person or property the offence is committed in the other : *Osborn v. Bank of U. S.*, 9 Wheat. 584. The construction contended for would limit the operation of the act to the prosecution of colored persons, a purpose already provided for by the laws of all the states. The plain intent of the act was

¹ On account of the great length of the case we are obliged to abridge the report of the first and second points.—ED. AM. LAW REG.

to protect such persons in cases where the laws of the states in which they lived failed to do so.

3. As to the constitutionality of the act.

SWAYNE, J.—The first eleven amendments of the constitution were intended to limit the powers of the government which it created, and to protect the people of the states. . . .

The twelfth amendment grew out of the contest between Jefferson and Burr for the presidency.

The thirteenth amendment is the last one made. It trenches directly upon the power of the states and of the people of the states. It is the first and only instance of a change of this character in the organic law. It destroyed the most important relation between capital and labor in all the states where slavery existed. It affected deeply the fortunes of a large portion of their people. It struck out of existence millions of property. The measure was the consequence of a strife of opinions, and a conflict of interests, real or imaginary, as old as the constitution itself. These elements of discord grew in intensity. Their violence was increased by the throes and convulsions of a civil war. The impetuous vortex finally swallowed up the evil, and with it for ever the power to replace it. Those who insisted upon the adoption of this amendment were animated by no spirit of vengeance. They sought security against the recurrence of a sectional conflict. They felt that much was due to the African race for the part it had borne during the war. They were also impelled by a sense of right, and by strong sense of justice, to an unoffending and long-suffering people. These considerations must not be lost sight of when we come to examine the amendment in order to ascertain its proper construction.

The Act of Congress confers citizenship. Who are citizens, and what are their rights? The constitution uses the words "citizen" and "natural born citizens;" but neither that instrument nor any Act of Congress has attempted to define their meaning. British jurisprudence, whence so much of our own is drawn, throws little light upon the subject. In Johnson's Dictionary "Citizen" is thus defined: "1. A freeman of a city; not a foreigner; not a slave; 2. A townsman, a man of trade; not a gentleman; 3. An inhabitant; a dweller in any place." The definitions given by other English lexicographers are substan-

tially the same. In Jacob's Law Dictionary (edition of 1783), the only definition given is as follows: "Citizens (*cives*) of London are either freemen or such as reside and keep a family in the city, &c. ; and some are citizens and freemen, and some are not, who have not so great privileges as others. The citizens of London may prescribe against a statute because their liberties are re-enforced by statute:" 1 Roll. 105.

Blackstone and Tomlin contain nothing upon the subject. "The word *civis*, taken in the strictest sense, extends only to him that is entitled to the privileges of a city, of which he is a member, and in that sense there is a distinction between a citizen and an inhabitant within the same city, for every inhabitant there is not a citizen:" *Scott qui tam v. Swartz*, Com. Rep. 68.

"A citizen is a freeman who has kept a family in a city:" *Roy v. Hanger*, 1 Roll. Rep. 138, 149.

"The term citizen, as understood in our law, is precisely analogous to the term subject in the common law; and the change of phrase has entirely resulted from the change of government. The sovereignty has been changed from one man to the collective body of the people, and he who before was a *subject of the king* is now a *citizen of the state*:" *The State v. Manuel*, 4 Dev. & Batt. 26.

In *Shanks et al. v. Dupont et al.*, 3 Peters 247, the Supreme Court of the United States said: "During the war each party claimed the allegiance of the natives of the colonies as due exclusively to itself. The Americans insisted upon the allegiance of all born within the states respectively; and Great Britain asserted an equally exclusive claim. The treaty of 1783 acted upon the state of things as it existed at that period. It took the actual state of things as its basis. All those, whether natives or otherwise, who then adhered to the American states, were virtually absolved from their allegiance to the British Crown, and those who then adhered to the British Crown, were deemed and held subjects of that Crown. The treaty of peace was a treaty operating between the states on each side, and the inhabitants thereof; in the language of the seventh article, it was a 'firm and perpetual peace between his Britannic Majesty and the said states, and between the subjects of the one and the citizens of the other.' Who then were *subjects* or *citizens* was to be decided by the state of facts. If they were originally subjects of Great Britain, and

then adhered to her and were claimed by her as subjects, the treaty deemed them such ; if they were originally British subjects, but then adhering to the states, the treaty deemed them citizens."

All persons born in the allegiance of the king are natural born subjects, and all persons born in the allegiance of the United States are natural born citizens. Birth and allegiance go together. Such is the rule of the common law, and it is the common law of this country as well as of England. There are two exceptions, and only two, to the universality of its application. The children of ambassadors are in theory born in the allegiance of the powers the ambassadors represent, and slaves, in legal contemplation, are property, and not persons: 2 Kent's Com. (last ed.) 1; *Calvin's Case*, 7 Coke 1; 1 Bl. Com. 366; *Lynch v. Clark*, 1 Sandf. Ch. Rep. 139.

The common law has made no distinction on account of race or color. None is now made in England nor in any other Christian country of Europe.

The fourth of the Articles of Confederation declared that "*the free inhabitants* of each of these states, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the United States," &c. On the 25th of June 1778, when these Articles were under consideration by the Congress, South Carolina moved to amend this fourth article by inserting after the word "free" and before the word "inhabitants," the word "white." Two states voted for the amendment and eight against it. The vote of one was divided: *Scott v. Sandford*, 19 How. 575. When the Constitution was adopted free men of color were clothed with the franchise of voting in at least five states, and were a part of the people whose sanction breathed into it the breath of life: *Scott v. Sandford*, 19 How. 573; *The State v. Manuel*, 2 Dev. & Batt. 24, 28.

"Citizens under our constitution and laws mean free inhabitants born within the United States or naturalized under the laws of Congress:" 1 Kent's Com. 292, note.

We find no warrant for the opinion that this great principle of the common law has ever been changed in the United States. It has always obtained here with the same vigor and subject only to the same exceptions, since as before the Revolution.

It is further said in the note in 1 Kent's Commentaries, before referred to: "If a slave born in the United States be manumitted

or otherwise lawfully discharged from bondage, or if a black man born in the United States becomes free, he becomes thenceforward a citizen, but under such disabilities as the laws of the several states may deem it expedient to prescribe to persons of color."

In the case of *The State v. Manuel* it was remarked: "It has been said that by the Constitution of the United States, the power of naturalization has been conferred exclusively upon Congress, and therefore it cannot be competent for any state by its municipal regulations to make a citizen. But what is *naturalization*? It is the removal of the *disabilities* of *alienage*. Emancipation is the removal of the *incapacity* of slavery. The latter depends wholly upon the internal regulations of the state. The former belongs to the government of the United States. It would be dangerous to confound them:" p. 25. This was a decision of the Supreme Court of North Carolina, made in the year 1836. The opinion was delivered by Judge GASTON. He was one of the most able and learned judges this country has produced. The same court, in 1848, Chief Justice RUFFIN delivering the opinion, referred to the case of *The State v. Manuel*, and said: "That case underwent a very laborious investigation by both the bench and the bar. The case was brought here by appeal, and was felt to be one of very great importance in principle. It was considered with an anxiety and care worthy of the principle involved, and which give it a controlling influence upon all questions of a similar nature:" *The State v. Newcomb*, 5 Iredell R. 253.

We cannot deny the assent of our judgment to the soundness of the proposition that the emancipation of a native born slave by removing the disability of slavery made him a citizen. If these views be correct, the provision in the Act of Congress conferring citizenship was unnecessary and is inoperative. Granting this to be so, it was well, if Congress had the power, to insert it, in order to prevent doubts and differences of opinion which might otherwise have existed upon the subject. We are aware that a majority of the court in the case of *Scott v. Sandford*, arrived at conclusions different from those we have expressed. But in our judgment these points were not before them. They decided that the whole case, including the agreed facts, was open to their examination, and that Scott was a slave. This central and controlling fact excluded all other questions, and what was said upon them by those of the majority, with whatever learning and ability the

argument was conducted, is no more binding upon this court as authority than the views of the minority upon the same subjects: *Carroll v. Carroll*, 16 How. 287.

The fact that one is a subject or citizen determines nothing as to his rights as such. *They* vary in different localities and according to circumstances.

Citizenship has no necessary connection with the franchise of voting, eligibility to office, or indeed with any other rights, civil or political. Women, minors, and persons *non compos* are citizens, and not the less so on account of their disabilities. In England, not to advert to the various local regulations, the new reform bill gives the right of voting for members of Parliament to about 800,000 persons from whom it was before withheld. There, the subject is wholly within the control of Parliament. Here, until the 13th amendment was adopted, the power belonged entirely to the states, and they exercised it without question from any quarter, as absolutely as if they were not members of the Union.

The first ten amendments to the constitution, which are in the nature of a bill of rights, apply only to the national government. They were not intended to restrict the power of the states: *Barrows v. The Mayor, &c.*, 7 Peters 247; *Withers v. Buckley et al.*, 20 How. 84; *Murphy v. The People*, 2 Cowen 818.

Our attention has been called to several treaties by which Indians were made citizens; to those by which Louisiana, Florida, and California were acquired, and to the act passed in relation to Texas. All this was done under the war and treaty-making powers of the constitution, and those which authorize the national government to regulate the territory and other property of the United States, and to admit new states into the Union: *American Ins. Co. v. Canter*, 1 Peters 511; *Cross v. Harrison*, 16 How. 164; 2 Story on the Const. 158.

These powers are not involved in the question before us, and it is not necessary particularly to consider them. A few remarks, however, in this connection will not be out of place. A treaty is declared by the constitution to be the "law of the land." What is unwarranted or forbidden by the constitution can no more be done in one way than in another. The authority of the national government is limited, though supreme in the sphere of its operation. As compared with the state governments, the subjects upon which it operates are few in number. Its objects are all national.

It is one wholly of delegated powers. The states possess all which they have not surrendered ; the government of the Union only such as the constitution has given to it, expressly or incidentally, and by reasonable intendment. Whenever an act of that government is challenged a grant of power must be shown, or the act is void.

“The power to make colored persons citizens has been actually exercised in repeated and important instances. See the treaty with the Choctaws of September 27th 1830, art. 14 ; with the Cherokees of May 20th 1836, art. 12 ; and the treaty of Guadalupe Hidalgo of the 2d of February 1848, art. 8 :” *Scott v. Sandford*, 19 Howard 486—Judge CURTIS’ opinion.

See, also, the treaty with France of April 30th 1803, by which Louisiana was acquired, art. 3 ; and the treaty with Spain of the 23d of February 1819, by which Florida was acquired, Art. 3.

The article referred to in the treaty with France, and in the treaty with Spain, is in the same language. In both, the phrase “inhabitants” is used. No discrimination is made against those, in whole or in part, of the African race. So in the treaty of Guadalupe Hidalgo (articles 8 and 9), no reference is made to color.

Our attention has been called to three provisions of the constitution, besides the 13th amendment, each of which will be briefly adverted to.

1. Congress has power “to establish an uniform rule of naturalization :” Art. 1, § 8. After considerable fluctuations of judicial opinion it was finally settled by the Supreme Court that this power is vested exclusively in Congress : *Collet v. Collet*, 2 Dall. 294 ; *United States v. Velati*, 2 Dall. 370 ; *Golden v. Prince*, 3 Wash. C. C. R. 313 ; *Chirac v. Chirac*, 2 Wheat. 259 ; *Houston v. Moore*, 2 Wheat. 49 ; *Federalist*, No. 32.

An alien naturalized is “to all intents and purposes a natural born subject :” Co. Litt. 129.

“Naturalization takes effect from *birth* ; denization from the date of the patent :” Vin. Ab., tit. *Alien D*.

Until the passage of a late Act of Parliament, naturalization in England was effected by a special statute in each case. The statutes were usually alike. The form appears in *Godfrey v. Dickson*, Cro. Jac. 539, c. 7. Under the late act, a resident alien may accomplish the object by a petition to the secretary of state for the home department.

The power is applicable only to those of foreign birth. Alienage is an indispensable element in the process. To make one of domestic birth a citizen, is not naturalization, and cannot be brought within the exercise of that power. There is an universal agreement of opinion upon this subject: *Scott v. Sandford*, 19 How. p. 578; 2 Story on the Constitution 44.

In the exercise of this power Congress has confined the law to *white persons*. No one doubts their authority to extend it to all aliens, without regard to race or color. But they were not bound to do so. As in other cases, it was for them to determine the extent and the manner in which the power given should be exercised. They could not exceed it, but they were not bound to exhaust it. It was well remarked by one of the dissenting judges in *Scott v. Sandford*, 19 Howard 586, in regard to the African race: "The constitution has not excluded them, and since that has conferred on Congress the power to naturalize colored aliens, it certainly shows color is not a necessary qualification for citizenship under the Constitution of the United States." It may be added that before the adoption of the constitution, the states possessed the power of making both those of foreign and domestic birth citizens, according to their discretion. This power as to the former they surrendered. They did not as to the latter, and they still possess it.

"The powers not delegated to the United States by this constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people:" Cons., 10th amendment.

What the several states under the original constitution only could have done, the nation has done by the 13th amendment. An occasion for the exercise of this power by the states may not, perhaps cannot, hereafter arise.

2. "The citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states:" Cons., art. 4, § 2.

This provision of the constitution applies only to citizens going from one state to another.

"It is obvious that if the citizens of each state were to be deemed aliens to each other, they could not take or hold real estate, or other privileges, except as other aliens."

"The intention of this clause was to confer on them, if one may so say, a general citizenship, and to communicate all the privi-

leges and immunities which *the citizens* of the same state would be entitled to under the same circumstances:" 2 Story on Cons., § 187.

Chancellor KENT says: "If citizens remove from one state to another they are entitled to the privileges that persons of *the same description* are entitled to in the state to which the removal is made, and to none other:" 2 Com. 36.

This provision does not bear particularly upon the question before us, and need not be further considered.

3. "The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion, and on application of the legislature or of the executive (when the legislature cannot be convened) against domestic violence:" Art. 4, § 4.

Mr. Justice STORY, adopting the language of the Federalist, says, that but for this power, "a successful faction might erect a tyranny on the ruins of order and law, while no succor could be constitutionally afforded by the Union to the friends and supporters of the Government." * * * "But a right implies a remedy, and where else could the remedy be deposited than where it is deposited by the Constitution?" 2 Story on Const. 559, 560.

This topic is foreign to the subject before us. We shall not pursue it further.

Congress, in passing the act under consideration, did not proceed upon this ground. It is not the theory or purpose of the act to apply the appropriate remedy for such a state of things.

The constitutionality of the act cannot be sustained under this section.

This brings us to the examination of the thirteenth amendment. It is as follows:

"Article XIII. Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

"Section 2. Congress shall have power to enforce this article by appropriate legislation."

Before the adoption of this amendment, the Constitution, at the close of the enumeration of the powers of Congress, authorized that body "to make all laws which shall be *necessary and proper* for carrying into execution the foregoing powers, and all

other powers vested by this Constitution in the Government of the United States, or any department or officer thereof.”

In *McCulloch v. Maryland*, Chief Justice MARSHALL used the phrase “appropriate” as the equivalent and exponent of “necessary and proper” in the preceding paragraph. He said: “Let the end be legitimate, let it be within the scope of the constitution, and all the means which are *appropriate*, which are plainly adapted to the end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.” * * “To use one” (a bank) “must be within the discretion of Congress, if it be an *appropriate* mode of executing the powers of government.” * * “But were its necessity less apparent” (the Bank of the United States), “none can deny its being an *appropriate* measure; and if it is, the degree of its necessity, as has been justly observed, is to be discussed in another place.”

Pursuing the subject, he added: “When the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power:” 4 Wheat. 421, 422, 423.

Judge STORY says: “In the practical application of government, then, the public functionaries must be left at liberty to exercise the powers with which the people, by the constitution and laws, have intrusted them. They must have a wide discretion as to the choice of means; and the only limitation upon that discretion would seem to be that the means are *appropriate* to the end; and this must admit of considerable latitude, for the relation between the action and the end, as has been justly remarked, is not always so direct and palpable as to strike the eye of every observer. If the end be legitimate and within the scope of the constitution, all the means which are *appropriate* and which are plainly adapted to that end, and which are not prohibited, may be constitutionally employed to carry it into effect:” 1 Story on Const., § 432.

These passages show the spirit in which the amendment is to be interpreted, and develop fully the principles to be applied. Before proceeding further, it will be well to pause and direct

our attention to what has been deemed *appropriate* in the execution of some of the other powers confided to Congress in like general terms.

(1). "The power to lay and collect taxes, duties, and imposts."

This includes authority to build custom houses; to employ revenue cutters; to appoint the necessary collectors and other officers; to take bonds for the performance of their duties; to establish the needful bureaus; to prescribe when, how, and in what the taxes and duties shall be paid; to rent or build warehouses for temporary storing purposes; to define all crimes relating to the subject in its various ramifications, with their punishment; and to provide for their prosecution.

(2). "To regulate commerce with foreign nations, among the several states, and with the Indian tribes."

This carries with it the power to build and maintain lighthouses, piers, and breakwaters; to employ revenue cutters; to cause surveys to be made of coasts, rivers, and harbors; to appoint all necessary officers, at home and abroad; to prescribe their duties, fix their terms of office and compensation; and to define and punish all crimes relating to commerce, within the sphere of the Constitution:" *United States v. Coombs*, 12 Peters 72; *United States v. Holliday*, 3 Wall. 407.

(3). "To establish post-offices and post-roads."

This gives authority to appoint a postmaster-general, and local postmasters throughout the country; to define their duties and compensation; to cause the mails to be carried by contract, or by the servants of the department, to all parts of the states and territories of the Union, and to foreign countries, and to punish crimes relating to the service, including obstructions to those engaged in transporting the mail while in the performance of their duty. The mail penal code comprises more than fifty offences. All of them rest for their necessary constitutional sanction upon this power, thus briefly expressed.

(4). "To raise and support armies."

This includes the power to enlist such number of men for such periods and at such rates of compensation as may be deemed proper; to provide all the necessary officers, equipments, and supplies, and to establish a military academy, where are taught military and such other sciences and branches of knowledge as may be deemed expedient, in order to prepare young men for the military service.

(5). "To provide and maintain a navy."

This authorizes the government to buy or build any number of steam or other ships of war, to man, arm, and otherwise prepare them for war, and to despatch them to any accessible part of the globe. Under this power the Naval Academy has been established: *United States v. Beavan*, 3 Wheat. 390.

These are but a small part of the powers which are incidental and *appropriate* to the main powers expressly granted. It is Utopian to believe that without such constructive powers, the powers expressed can be so executed as to meet the intentions of the framers of the constitution, and accomplish the objects for which governments are instituted. The constitution provides expressly for the exercise of such powers to the full extent that may be "necessary and proper." No other limitation is imposed. Without this provision, the same result would have followed. The means of execution are inherently and inseparably a part of the power to be executed.

The constitution declares that "the senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath to support this constitution." No other oath is required, "yet he would be charged with insanity who would contend that the legislature might not superadd to the oath directed by the constitution such other oath of office as its wisdom might suggest:" *McCulloch v. Maryland*, 4 Wheat. 416.

The Bank of the United States, with all its faculties, was sustained because it was "convenient" and "appropriate" for the Government in the management of its fiscal affairs: 4 Wheat. 316.

Perhaps no measures of the National Government have involved more doubt of their constitutionality than the acquisition of Louisiana and the embargo. Both were carried through Congress by those who had been most strenuous for a strict construction of the constitution. Mr. Jefferson thought the former *ultra vires*, and advised an amendment of the constitution, but expressed a willingness to acquiesce if his friends should entertain a different opinion: 2 Story on the Const. 160.

The second Bank of the United States was a measure of the same class of thinkers. The acquisition of Florida involved

the same question of constitutional power as the acquisition of Louisiana. It was universally acquiesced in, and the constitutional question was not raised.

It is an axiom in our jurisprudence that an act of Congress is not to be pronounced unconstitutional unless the defect of power to pass it is so clear as to admit of no doubt. Every doubt is to be resolved in favor of the validity of the law.

“The opposition between the constitution and the law should be such, that the judge feels a clear and strong conviction of their incompatibility with each other:” *Fletcher v. Peck*, 6 Cr. 128.

“The presumption indeed must always be in favor of the validity of laws, if the contrary is not clearly demonstrated:” *Cooper v. Telfair*, 4 Dall. 18.

“A remedial power in the constitution is to be construed liberally:” *Chisholm v. Georgia*, 2 Dall. 476.

“Perhaps the safest rule of interpretation after all, will be found to be to look to the nature and objects of the particular powers, duties, and rights, with all lights and aids of cotemporary history, and to give to the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed:” *Prigg v. The Commonwealth of Pennsylvania*, 16 Peters 60.

Since the organization of the Supreme Court, but three Acts of Congress have been pronounced by that body void for unconstitutionality: *Marbury v. Madison*, 1 Cr. 137; *Scott v. Sandford*, 19 How. 393; *Ex parte Garland*, 4 Wall. 334.

The present effect of the amendment was to abolish slavery wherever it existed within the jurisdiction of the United States. In the future it throws its protection over every one, of every race, color, and condition, within that jurisdiction, and guards them against the recurrence of the evil.

The constitution, thus amended, consecrates the entire territory of the republic to freedom, as well as to free institutions. The amendment will continue to perform its function throughout the expanding domain of the nation, without limit of time or space. Present possessions and future acquisitions will be alike within the sphere of its operation. Without any other provision than the 1st section of the amendment, Congress would have had authority to give full effect to the abolition of slavery thereby decreed.

It would have been competent to put in requisition the execu-

tive and judicial, as well as the legislative power, with all the energy needful for that purpose. The 2d section of the amendment was added out of abundant caution. It authorizes Congress to select, from time to time, the means that might be deemed appropriate to the end. It employs a phrase which had been enlightened by well-considered judicial application. Any exercise of legislative power within its limits involves a legislative, and not a judicial question. It is only when the authority given has been clearly exceeded that the judicial power can be invoked. Its office, then, is to repress and annul the excess; beyond that, it is powerless.

We will now proceed to consider the state of things which existed before, and at the time the amendment was adopted, the mischiefs complained of or apprehended, and the remedy intended to be provided for existing and anticipated evils.

When the late civil war broke out, slavery of the African race existed in fifteen states of the Union. The legal code relating to persons in that condition was everywhere harsh and severe. An eminent writer said: "They cannot take property by descent or purchase; and all they find and all they own belongs to their master. They cannot make contracts, and they are deprived of civil rights. They are assets for the payment of debts, and cannot be emancipated by will or otherwise to the prejudice of creditors:" 2 Kent's Com. 281, 282. In a note it is added: "In Georgia, by an Act of 1829, no person is permitted to teach a slave, a negro, or a free person of color to read or write. So in Virginia, by a statute of 1830, meetings of free negroes to learn reading or writing are unlawful, and subject them to corporeal punishment; and it is unlawful for white persons to assemble with free negroes or slaves to teach them to read or write. The prohibitory act of the legislature of Alabama, passed at the session of 1831-2, relative to the instruction to be given to the slaves or free colored population, or exhortation or preaching to them, or any mischievous influence attempted to be exerted over them, is sufficiently penal. Laws of similar import are presumed to exist in the other slave-holding states, but in Louisiana the law on the subject is armed with ten-fold severity. It not only forbids any person teaching slaves to read or write, but it declares that any person using language in any public discourse from the bar, bench, stage, or pulpit, or any other place, or in any private con-

versation, or making use of any sign or actions having a tendency to produce discontent among the free colored population or insubordination among the slaves; or who shall be knowingly instrumental in bringing into the state any paper, book, or pamphlet having a like tendency, shall, on conviction, be punishable with imprisonment or death, at the discretion of the court."

Slaves were imperfectly, if at all, protected from the grossest outrages by the whites. Justice was not for them. The charities and rights of the domestic relations had no legal existence among them. The shadow of the evil fell upon the free blacks. They had but few civil and no political rights in the slave states. Many of the badges of the bondman's degradation were fastened upon them. Their condition, like his, though not so bad, was helpless and hopeless. This is borne out by the passages we have given from Kent's Commentaries. Further research would darken the picture. The states had always claimed and exercised the exclusive right to fix the *status* of all persons living within their jurisdiction.

On the 1st of January 1863 President Lincoln issued his proclamation of emancipation. Missouri and Maryland abolished slavery by their own voluntary action. Throughout the war the African race had evinced entire sympathy with the Union cause. At the close of the rebellion two hundred thousand had become soldiers in the Union armies. The race had strong claims upon the justice and generosity of the nation. Weighty considerations of policy, humanity, and right were superadded. Slavery, in fact, still existed in thirteen states. Its simple abolition, leaving these laws and this exclusive power of the states over the emancipated in force, would have been a phantom of delusion. The hostility of the dominant class would have been animated with new ardor. Legislative oppression would have been increased in severity. Under the guise of police and other regulations, slavery would have been in effect restored, perhaps in a worse form, and the gift of freedom would have been a curse instead of a blessing to those intended to be benefited. They would have had no longer the protection which the instinct of property leads its possessor to give in whatever form the property may exist. It was to guard against such evils that the second section of the amendment was framed. It was intended to give expressly to Congress the requisite authority, and to leave no room for doubt

or cavil upon the subject. The results have shown the wisdom of this forecast. Almost simultaneously with the adoption of the amendment this course of legislative oppression was begun. Hence, doubtless, the passage of the act under consideration. In the presence of these facts, who will say it is not an "*appropriate*" means of carrying out the object of the first section of the amendment, and a necessary and proper execution of the power conferred by the second? Blot out this act, and deny the constitutional power to pass it, and the worst effects of slavery might speedily follow. It would be a virtual abrogation of the amendment.

It would be a remarkable anomaly if the national government, without this amendment, could confer citizenship on aliens of every race or color, and citizenship, with civil and political rights, on the "inhabitants" of Louisiana and Florida, without reference to race or color, and cannot, with the help of the amendment, confer on those of the African race, who have been born and always lived within the United States, all that this law seeks to give them.

It was passed by the Congress succeeding the one which proposed the amendment. Many of the members of both houses were the same.

This fact is not without weight and significance: *McCulloch v. Maryland*, 4 Wheat. 401.

The amendment reversed and annulled the original policy of the constitution, which left it to each state to decide exclusively for itself whether slavery should or should not exist as a local institution, and what disabilities should attach to those of the servile race within its limits. The whites needed no relief or protection, and they are practically unaffected by the amendment. The emancipation which it wrought was an act of great national grace, and was doubtless intended to reach further in its effects, as to every one within its scope, than the consequences of manumission by a private individual.

We entertain no doubt of the constitutionality of the act in all its provisions.

It gives only certain civil rights. Whether it was competent for Congress to confer political rights also, involves a different inquiry. We have not found it necessary to consider the subject.

We are not unmindful of the opinion of the Court of Appeals

of Kentucky, in the case of *Brown, Appellant, v. The Commonwealth*. With all our respect for the eminent tribunal from which it proceeded, we have found ourselves unable to concur in its conclusions. The constitutionality of the act is sustained by the Supreme Court of Indiana and the Chief Justice of the Court of Appeals of Maryland, in able and well considered opinions: *Smith v. Moody et al.*; *In re A. H. Somers*.

We are happy to know, that if we have erred, the Supreme Court of the United States can revise our judgment and correct our error. The motion is overruled, and judgment will be entered upon the verdict.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF MARYLAND.¹

SUPREME COURT OF NEW HAMPSHIRE.²

SUPREME COURT OF NEW YORK.³

ACTION.

Amendment.—A declaration containing the usual money counts, and counts for goods sold and delivered, and for work and labor, and materials found, cannot be amended by introducing a special count upon a lease for unliquidated damages, for breach of the tenants' agreement to carry on the farm in a husbandlike manner, and the like: *O'Burt v. Kinne et al.*, Sup. Ct. N. H.

ARBITRATION AND AWARD.

Independent Awards—Non-Performance by One.—Where arbitrators award something to be done by each party, and the acts are distinct and independent, the one not being a condition precedent to the other, the failure of one party to perform his part of the award, furnishes no excuse for the other; and cannot be set up as a defence to a suit against him: *Girdler v. Carter*, Sup. Ct. N. H.

Where, in a submission between a landlord and tenant, it is awarded that the landlord shall, at a day named, have a certain cow and calf, it was held that the title to them passed by force of the award, without any further act by the tenant: *Id.*

¹ From N. Brewer, Esq., Reporter; to appear in 23 Md. Rep.

² For these notes of very recent decisions we are indebted to the judges of the court. The volume in which they will be reported cannot yet be indicated.

³ From Hon O. L. Barbour; to appear in Vol. 48 of his Reports.